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Macpherson v. IRS: A Dilution of First Amendment Rights in Favor of Expanded Federal Agency Law Enforcement Powers, 20 J. Marshall L. Rev. 795 (1987)

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CASENOTES

*MACPHERSON v. IRS:** A DILUTION OF FIRST AMENDMENT RIGHTS IN FAVOR OF EXPANDED FEDERAL AGENCY LAW ENFORCEMENT POWERS

The Privacy Act of 1974[1] ("Act") mandates that federal agencies adhere to minimum standards[2] regarding the gathering and use of private information.[3] One of the most important provisions of the Act is the section[4] prohibiting federal agencies[5] from maintaining[6]

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* 803 F.2d 479 (9th Cir. 1986).

1. The purpose of the Privacy Act is to balance an individual's privacy interests against the informational needs of government. The Privacy Act of 1974, Pub. L. 93-579, 1974 U.S. CODE CONGRESS & ADMIN. NEWS (80 Stat.) 2178 [hereinafter Privacy Act]. The Act, which applies only to federal agencies, was passed during the Watergate scandal and was enacted in response to public concern over the government's collection of large amounts of information and its potential adverse effects on privacy. J. FRANKLIN, R. BOUCHARD, GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS § 2.02 (2d ed. 1986). In 1974, 54 federal agencies studies had 858 data banks, holding 1.25 billion records on individuals. *Id.* In fact, an expert estimated that there were at least 20 records for each average American citizen. *Id.*

Allegations of wiretapping and surveillance of private citizens during Watergate provided added incentive for Congress to control the collection of information. *Id.* Watergate, however, also hampered passage of the Act. *Id.* Following the impeachment process, only the last few months of the session remained for debate and final passage. *Id.* § 2.03.

The Senate and the House of Representatives passed their own bills for the Privacy Act, but due to the lack of time, Congress did not follow the normal procedure for final passage. *Id.* § 2.03-04. Although no conference report was printed, Senator Ervin and Representative Moorhead each inserted a document into the Congressional Record entitled "ANALYSIS OF HOUSE AND SENATE COMPROMISE AMENDMENTS TO THE FEDERAL PRIVACY ACT." *Id.* §2.03[4]. President Ford signed the compromise bill into law on December 31, 1974. *Id.* § 2.02.

2. 120 CONG. REC. S19,833 (daily ed. Nov. 21, 1974) (statement of Sen. Ervin).

3. The Privacy Act was based on the congressional finding that federal agency collection, maintenance, use, and dissemination of personal information directly affects individual privacy. The Privacy Act, *supra* note 1. The 93rd Congress also found that the increasing use of computers and sophisticated information technology has increased the potential harm to individual privacy. *Id.* § (a)(2). Using its power derived from the "necessary and proper" clause expressed in article I, section 8, clause 18 of the United States Constitution, Congress found it necessary and proper to regulate federal agencies in their collection, maintenance, use, and dissemination of personal information. *Id.* § (a)(5).

4. Section 552a(e)(7) provides:

Each agency that maintains a system of records shall . . . maintain no record

records[7] describing how an individual[8] exercises his or her first amendment rights.[9] Congress has, however, provided three exceptions to this provision.[10] For example, a federal agency may gather such records if the desired information is pertinent to and within the scope of an authorized "law enforcement activity."[11] In *MacPherson v. Internal Revenue Service*,[12] the United States Court of Appeals for the Ninth Circuit held that the Internal Revenue Service ("IRS") did not violate the Act when it maintained a dossier detailing an attorney's speeches delivered before "tax protester"

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describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity.

5 U.S.C. § 552a(e)(7)(1976).

Of the several compromises in the Privacy Act, one pertained to § 552a(e)(7). The House Bill prohibited any agency from maintaining records pertaining only to the political or religious beliefs of an individual. 120 CONG. REC. H10,892 (daily ed. Nov. 20, 1974) (statement of Rep. Ichord). The Senate Bill, however, contained an expanded version prohibiting the maintenance of records pertaining to how people exercise their first amendment rights. 120 CONG. REC. S19,833 (daily ed. Nov. 21, 1974) (statement of Sen. Ervin). The Senate version was adopted in the final bill, but only as to the general prohibition. 120 CONG. REC. S21,816 (daily ed. Dec. 17, 1974) (ANALYSIS OF HOUSE AND SENATE COMPROMISE AMENDMENTS TO THE FEDERAL PRIVACY ACT). The final bill adopted the House version of § 552a(e)(7)'s "law enforcement" exception. *Id.*

5. The Privacy Act refers to the Freedom of Information Act (FOIA) to define the term "agency." 5 U.S.C. § 522a(a)(1) (1976). The FOIA defines "agency" as any authority of the United States Government, including any executive department, military department, government corporation, government-controlled corporation, or other establishment in the executive branch, the Executive Office of the President, and any independent regulatory agency, but excluding Congress and the courts. *Id.* §§ 551(1), 552(e).

6. The term "maintain" means maintain, collect, use or disseminate. *Id.* § 522a(a)(3).

7. The statute defines "records" as "any item, collection, or grouping of information about an individual that is maintained by an agency . . . that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph." *Id.* § 552a(a)(4).

8. The term "individual" is defined in the statute as "a citizen of the United States or an alien lawfully admitted for permanent residence." *Id.* § 552a(a)(2).

9. The first amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I. In addition to the right of free speech and press, the first amendment includes the right to utter or print, the right to distribute and receive, and the right to read. Martin v. City of Struthers, 319 U.S. 141, 143 (1943), *cited in* Griswold v. Connecticut, 381 U.S. 479, 482 (1965). Also included is the freedom of inquiry, the freedom of thought, and the freedom to teach. Wieman v. Updegraff, 344 U.S. 183, 195 (1952), *cited in Griswold*, 381 U.S. at 482. Finally, the first amendment has been construed to include the freedom of association, the parental choice for a child's education in a public, private, or parochial school, and the choice of a particular subject in education. *Id.*

10. *See supra* note 4.

11. *Id.*

12. 803 F.2d 479 (9th Cir. 1986).

groups.[13] The court addressed the issue of whether the act permits a federal agency to maintain a record describing an individual's first amendment activities when there is no basis to suspect that individual of illegal activity.[14] The court answered this question in the affirmative, broadly interpreting the "law enforcement" exception and reinstituting the previously unchecked investigatory powers that Congress sought to restrict.

In the early 1980's, the IRS engaged in surveillance of individuals and organizations associated with the "Tax Protester Movement."[15] The IRS sought to identify the leaders of this movement, learn their strategies, and identify parties advocating illegal activities.[16] In conjunction with this investigation, IRS agents attended meetings and conventions[17] at which Donald MacPherson, an attorney specializing in criminal tax defense,[18] spoke on various topics.[19] The agents took notes describing the events and purchased tape recordings of MacPherson's speeches which were later transcribed.[20] Initial observations revealed that MacPherson did not advocate illegal activities, nor was there any reference to past, present or anticipated crimes.[21] Nevertheless, the notes and transcripts describing MacPherson's speeches were placed in the IRS' "Tax Protest Pro-

13. *Id.* at 485. The IRS defines "Tax Protesters" as persons who protest their taxes on constitutional grounds, which courts have held are without merit, and devise tax liability reduction schemes involving family estate trusts, alleged churches, foreign trust organizations, and sham transaction. *See* England, III v. Commissioner of Internal Revenue, 798 F.2d 350, 352 (9th Cir. 1986).

14. *MacPherson*, 803 F.2d at 480-82.

15. *Id.* at 480. *See supra* note 13 for definition of "Tax Protester."

16. Brief for the Appellees at 3, *MacPherson*, 803 F.2d 479.

17. *MacPherson*, 803 F.2d at 480. MacPherson spoke before The Golden Means Society of the Arizona Caucus Club in November, 1980 and April, 1981. Brief for the Appellees at 2, *MacPherson*, 803 F.2d 479. An IRS agent, under an assumed name, took handwritten notes and purchased tape recordings at the April meeting. *Id.* at 2-3. Although no IRS agents attended the previous November meeting, the IRS also managed to purchase tape recordings of that meeting. *Id.* at 3. Following the April, 1981 meeting, MacPherson spoke at the "Constitutionalist Lawyer Convention" of the National Patriot Network in November of 1981. *Id.* at 4. Three IRS agents attended that meeting and again took notes and purchased tapes of MacPherson's speeches. *Id.* at 4, 6.

18. Opening Brief of Plaintiff/Appellant at 3, *MacPherson*, 803 F.2d 479.

19. MacPherson covered topics ranging from pre-trial motions and strategies to types of government attacks and proper responses. *Id.* Other speakers spoke on other topics including: "The Tax Lawyer Speaks: How to Present the Case From a Tax Standpoint"; "Jury Selection, the Jury Charge, Evidentiary Matters and Disqualifying Judges"; and "Continuances, the Speedy Trial Act and TV Cameras in the Courtroom." *Id.* at 38.

20. *MacPherson*, 803 F.2d at 480.

21. *Id.* In *Clarkson v. IRS*, 678 F.2d 1368, 1375 (11th Cir. 1982), the Eleventh Circuit held that § 552a(e)(7) is violated when an agency collects "protected information unconnected to any investigation of past, present or anticipated violations of the statutes which it is authorized to enforce." *Id.* This was the standard urged by MacPherson. *MacPherson*, 803 F.2d at 483.

ject File."[22] The file's contents were then distributed to other IRS offices and to the Department of Justice.[23]

MacPherson sued the IRS, claiming seven Privacy Act violations.[24] Following discovery, MacPherson and the IRS both moved for summary judgment.[25] The district court granted the government's motion.[26] Interpretating the "law enforcement" exception in § 552a(e)(7) broadly, the district court held that an investigative record need only be relevant to an authorized investigation to comply with the Privacy Act.[27] MacPherson appealed the district court's holding.[28] On appeal, The ninth circuit addressed the issue of whether the IRS records describing MacPherson's speeches fell within the Act's law enforcement exception.[29] The court rejected the district court's test[30] and instead applied a balancing test.[31] The court found that the records were "necessary to give the agency a complete and representative picture of the events,"[32] and that the agency's need for this information outweighed public policy considerations.[33] The court, therefore, held that the IRS records were maintained pursuant to an "authorized law enforcement activity" and thus did not violate the Act.[34]

The *MacPherson* court first addressed the applicability of the

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22. The IRS placed memoranda of surveillance, tape recordings, notes, and other related records in a file labelled the "Tax Protest Project File" in the Houston district office. Brief for the Appellees at 6, *MacPherson*, 803 F.2d 479.

23. *MacPherson*, 803 F.2d at 480.

24. *Id.* The court's opinion states that there were seven counts in MacPherson's complaint. MacPherson, however, mentioned eight counts in his brief. The eight counts were: (1) maintenance of records describing MacPherson's first amendment activities (§ 522a(e)(7)); (2) illegal disclosure (§ 552a(b)); (3) failure to keep an accounting of certain disclosures (§ 552a(c)); (4) failure to maintain information that is necessary and relevant (§ 552a(e)(1)); (5) failure to collect information from the subject individual to the greatest extent practicable (§ 552a(e)(2)); (6) failure to publish notice of the system of records (§ 552a(e)(4)); (7) failure to maintain accurate records (§ 552a(e)(5)); and (8) failure to disseminate accurate records (§ 551a(e)(6)). Opening Brief of Plaintiff/Appellant at 7-8, *MacPherson*, 803 F.2d 479. MacPherson filed a motion for summary judgment on counts 1, 2, and 4 and later voluntarily dismissed the rest. *Id.* at 1.

25. *MacPherson*, 803 F.2d at 480. MacPherson filed a motion for summary judgment on counts 1, 2 and 4 and later voluntarily dismissed the rest. Opening Brief for Plaintiff/Appellant at 1, *MacPherson*, 803 F.2d 479.

26. *MacPherson*, 803 F.2d at 480.

27. *Id.* at 482. The district court stated that "[t]here is no requirement that the investigation relate to a specific criminal act or to a specific individual."

28. *Id.* at 480.

29. *Id.* at 482. The appellate court obtained jurisdiction under 28 U.S.C. § 1291 (1982), and the court reviewed the district court's proceedings *de novo*.

30. *See supra* note 27.

31. *MacPherson*, 803 F.2d 484. For a discussion of the court's balancing test, see *infra* text accompanying notes 47-50.

32. *MacPherson*, 803 F.2d at 484.

33. *Id.* at 484-85.

34. *Id.* at 481.

Act to the records at issue. The court held that the transcripts and recordings constituted "records."[35] There was no dispute that the IRS and Justice Department were "agencies" as defined in the Act,[36] and there was also no dispute that the records described first amendment activities.[37] The government, however, contended that the specific application of § 552a(e)(7) was invalid because the records were not incorporated into a "system of records."[38] Under the Act, some provisions only govern those records that are a part of a system of records.[39] The court, however, held that this requirement was not applicable to § 552a(e)(7).[40]

The court next addressed the IRS' contention that the MacPherson file fell within the purview of the "law enforcement" excep-

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35. *Id. See supra* note 7.

36. MacPherson v. IRS, 803 F.2d 479, 481. *See supra* note 5.

37. *MacPherson*, 803 F.2d at 481.

38. *Id.* The term "system of records" means "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(b)(5) (1976).

39. *See* 5 U.S.C. § 552a(b)-a(c) (1976).

40. Section 552a(b) begins: "No agency shall disclose any record which is *contained* in a system of records. . . .", and section 552a(c) begins: "Each agency, *with respect* to each system of records under its control shall. . . ." 5 U.S.C. § 552a(b)-a(c) (1976) (emphasis added). In contrast, section 552a(d) begins: "Each agency that *maintains* a system of records shall. . .", and Section 552a(e) begins: "Each agency that *maintains* a system of records shall. . ." *Id.* § 552a (emphasis added). The *MacPherson* court equated "maintains" with the word "keeps"; concluding, therefore, that Section § 552a(e)(7) additionally protects agency records possessed by an agency that keeps a system of records rather than limiting its application to records incorporated into a system of records. *MacPherson*, 803 F.2d at 481. The *MacPherson* court also approved of the rulings in Albright v. United States, 631 F.2d 915, 918-20 (D.C. Cir. 1980), and Clarkson v. IRS, 678 F.2d 1368 (11th Cir. 1982).

In *Albright*, the Department of Health, Education and Welfare videotaped a meeting between a personnel officer and several employees of the Social Security Administration. *Albright*, 631 F.2d at 917. The employees had no knowledge of the videotape which was later labeled and locked in a file at the Bureau. *Id.* Regarding the alleged violation of § 552a(e)(7), the *Albright* court stated that since mere collection constitutes a violation of § 552a(e)(7), no purpose could be served with an added requirement that a record be incorporated into a system of records. *Id.* at 920. The court based its conclusion on the following premises: (1) information about an individual can be retrieved from records not incorporated into a system of records and that do not identify the individual by name; and, (2) Congress intended for first amendment rights to be accorded special protection. *Id.* at 919.

In *Clarkson*, the court noted that before the Privacy Act was passed, the courts recognized constitutional actions for the expungement of records collected and maintained in violation of the first amendment. 678 F.2d 1368, 1372-77 (11th Cir. 1982). Subsequently, the court held that a plaintiff could be entitled to expungement or amendment of records violative of § 552a(e)(7) even if the records are not part of the agency's system of records. *Id.* at 1376-77. The *MacPherson* court also observed that if incorporation were required, an agency could circumvent § 552a(e)(7)'s general prohibition merely by using separate individual files, and using the nature and content of the first amendment activity to identify a particular person. *MacPherson*, 803 F.2d at 481.

tion.[41] Interpretation of the "law enforcement" exception posed a question of first impression for the ninth circuit.[42] The IRS suggested that the court analogize the law enforcement exception to a similar provision in the Freedom of Information Act (FOIA).[43] The court refused to make this analogy because the law enforcement exception in the Act permits a governmental *invasion* of privacy when properly invoked.[44] The "law enforcement purposes" exception in the FOIA, however, *protects* privacy when properly invoked.[45] After rejecting the government's proposed analogy, the court turned to prior case law for help in interpreting the Act's law enforcement exception.

Prior to *MacPherson*, only the sixth and eleventh circuits had interpreted the Act's "law enforcement" exception.[46] Unsatisfied with the tests these courts had applied, the *MacPherson* court adopted a balancing test calling for a case by case analysis of the

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41. *MacPherson*, 803 F.2d at 481-82. MacPherson agreed that the IRS agents may have had a duty to attend the meetings to gather information on individuals who broke the law or advocated that other persons break the law. Opening Brief of Plaintiff/Appellant at 18-19, *MacPherson*, 803 F.2d 479. MacPherson contended, however, that once the IRS agents determined that he did not break the law, or advocate breaking the law, the agents lacked the prerequisite justifications for maintaining a record describing his first amendment activites. *Id.* at 19.

42. *MacPherson*, 803 F.2d at 482.

43. *Id.* Section 552a(b)(7) of the Freedom of Information Act (FOIA) provides an exemption to disclosure of information when the record is "compiled for law enforcement purposes." 5 U.S.C. § 552a(b)(7) (1976). Previously, the ninth circuit held in Binion v. United States Dep't of Justice, 695 F.2d 1189, 1194 (9th Cir. 1983), that this exemption applies to records having a "rational nexus" with the agency's law enforcement duties. The IRS was trying to persuade the ninth circuit to use *Binion* in formulating an equally broad standard for The Privacy Act as well. *Id.*

44. *MacPherson*, 803 F.2d at 482. The court reasoned that the law enforcement exemption in the FOIA is intended to protect confidential informants and protect the privacy of innocent people. *Id.* Consequently, the broader the construction of this exemption, the more protection is provided for privacy. *Id.* On the other hand, the law enforcement exception of § 552a(e)(7) allows the government to abridge first amendment rights. *Id.* Therefore, the narrower the construction of this exception, the more protection is provided for privacy. *Id.* The court concluded that the two exceptions operate differently. Thus, an analogy between the two would have been inappropriate. *Id.*

45. *See supra* note 44.

46. *MacPherson*, 803 F.2d at 483. In Jabara v. Kelly, 476 F. Supp. 561 (E.D. Mich. 1979) (*Jabara*), the district court held that the "law enforcement" exception cannot apply to records "which do not relate to specific past, present or future criminal acts." *Id.* This standard was broadened on appeal in Jabara v. Webster, 691 F.2d 272 (6th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983) (*Jabara* II). In that case, the Sixth Circuit Court of Appeals held that § 552a(e)(7) permits the maintenance of records pertaining to an individual's excercise of first amendment rights where there is a relevant authorized criminal, intelligence, or administrative investigation. However, in Clarkson v. IRS, the Eleventh Circuit Court of Appeals adopted the Sixth Circuit's narrower standard of *Jabara I*, which was vacated and remanded on appeal in *Jabara II* after *Clarkson* was decided. The *MacPherson* court rejected both tests in favor of a balancing test.

facts and circumstances.[47] The court determined there are four policy considerations to be evaluated in the balancing test. The first is preventing the collection of protected information, and the second is avoiding a chilling effect on the exercise of first amendment rights.[48] Conversely, the court determined that the inevitable observation and recording of the actions of innocent people is necessary to achieve the objective behind the law enforcement exception.[49] The court further determined as its last policy consideration that completeness and accuracy in agency records is needed to assist law enforcement operations.[50]

The court next applied its balancing test to the facts of the case. Weighing all four competing interests, the court concluded that MacPherson's speeches were not deserving of protection.[51] The court based its conclusion not only on the fact that the speeches were public, but also that tape recordings of the speeches were sold to conventioneers.[52] Moreover, the court reasoned that MacPherson's speeches were significant events at the convention and were, therefore, necessary to achieve completeness and accuracy in the IRS' records.[53] Additionally, the court stated there was no indication that the records were used or intended to be used for any purpose other than to give a complete picture.[54] Based on these circumstances, the court ruled that the IRS records pertaining to MacPherson fell within the Act's law enforcement exception.[55]

The decision arrived at in *MacPherson* was erroneous for two

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47. *MacPherson*, 803 F.2d 484.

48. The purpose of § 552a(e)(7) is to prevent "collection of protected information not immediately needed, about law-abiding Americans, on the off-chance that Government or the particular agency might possibly have to deal with them in the future." *MacPherson*, 803 F.2d at 483 (citing S. REP. No. 1183, 93d Cong., 2d Sess. 57, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6916, 6971.) Furthermore, "the mere compilation by the government of records describing the exercise of first amendment freedoms creates the possibility that those records will be used to the speaker's detriment, and hence has a chilling effect on such exercise." *MacPherson*, 803 F.2d at 484 (citing Nagle v. United States Dep't of Health, Education and Welfare, 725 F.2d 1438, 1441 (D.C. Cir. 1984)).

49. The goal of the law enforcement exception is to prevent political and religious activities from being used as a cover for subversive activities. *MacPherson*, 803 F.2d at 484 (citing 120 CONG. REC. H10, 892 (Nov. 20, 1974)). The court recognized that surveillance and recording of the actions of innocent people is inevitable during an investigation. *Id.* The court reasoned that the collection and maintenance of information pertaining to innocent participants is necessary because excision of information about innocent people is administratively burdensome. *Id.*

50. The court concluded that excision of references to innocent participants from agency records would hurt the completeness and accuracy of agency records. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 484-85.

55. *Id.* at 485.

reasons. First, the court's balancing test[56] contradicts congressional intent.[57] Second, the court's interpretation of the Act failed to apply an established constitutional principle.[58] When legislation infringes upon a fundamental right,[59] such legislation must satisfy a compelling governmental interest.[60] Law enforcement is certainly a compelling interest. The inclusion, however, of an individual's identity and his first amendment activities in a government file, in the absence of any foundation for suspecting that individual of criminal activity, is not necessary for effective law enforcement.

Congress enacted the Act's provisions in section (e) in order to balance the individual's right of privacy against the government's need for information.[61] Congress designed section (e) so that the balance will favor privacy.[62] In section 552a(e)(7), Congress sought to protect privacy by prohibiting the record-keeping of information pertaining to first amendment rights.[63] Additionally, Congress deemed it necessary to provide greater protection for first amendment rights than that provided for the other privacy rights covered in section (e).[64] The court, therefore, should have given greater weight to the protection of MacPherson's first amendment rights when it balanced those rights against the government's interests.[65]

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56. *See supra* notes 47-50 and accompanying text.

57. *See infra* notes 61-71 and accompanying text.

58. *See infra* notes 95-96 and accompanying text.

59. *See infra* notes 95-96 and accompanying text.

60. *See infra* notes 95-96 and accompanying text.

61. The agency requirements prescribed in Section 552a(e) are "designed to insure that a federal agency weighs strongly the rights of personal privacy against its authority and need to gather personal information for a public purpose." S. REP. No. 1183, 93rd Cong., 2d Sess. 45, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6916, 6960.

62. *Id.*

63. 120 CONG. REC. S21, 816 (Dec. 17, 1974) (analysis of House and Senate Compromise Amendments to the Federal Privacy Act.). *See supra* note 1.

64. Section 552a(e)(1) prohibits agencies from collecting information that is not "relevant and necessary to accomplish a purpose of the agency." Section 552a(e)(7), on the other hand, "establishes an even more rigorous standard governing the maintenance of records regarding the exercise of first amendment rights." 40 Fed. Reg. 28,965 (July 9, 1975) (Office of Management And Budget's Privacy Act Implementation-Guidelines and Responsibilities).

65. In further support of the proposition that Congress intended that the law enforcement exception be narrowly construed, it is noteworthy that at the Data Bank hearings, Professor Arthur R. Miller had a strong influence on the Senate subcommittee investigating computerized data banks. *See* Comment, *The Privacy Act of 1974: An Overview And Critique*, 1976 WASH. U.L.Q. 667, n.49. In an exchange between Senator Ervin, one of the sponsors of the legislation, and Professor Miller, the record revealed the following statements:

> Miller: The potent evil here is that citizens, as they become aware that their conduct and associations are being monitored, may simply become less willing to engage in activities that the Constitution of the United States expressly protects and encourages.
>
> Senator Ervin: And what you are saying, in substance, as I construe it, is that this gathering of all this information on the activities of individuals which

When drafting section 552a(e)(7), Congress recognized that law enforcement would suffer if surveillance and the gathering of information regarding first amendment activities were barred.[66] Thus, Congress amended the provision with the "law enforcement" exception.[67] The exception alleviated congressional fear that political and religious activities could be used as a cover for subversive activities.[68] Nevertheless, Congress' concern over numerous instances of abuse of federal investigatory power reveals a congressional intent to restrict the federal government in its use of domestic surveillance.[69]

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are lawful in nature and encouraged by the First Amendment is calculated to coerce individuals not to exercise the freedoms which are calculated to make their minds and spirits free, and that in the long run the Government itself is going to suffer from the effects of this as much as the citizens are to suffer by the loss of those freedoms.

Miller: Yes, Senator. I think you put your finger on perhaps one of the real keys in this arena . . . . It is not essential that dossiers, files, surveillance, actually are used to repress people. If these activities give the appearance of repression that in and of itself has a chilling effect on the precious rights guaranteed to us by the Constitution.

Federal Data Banks, Computers, and The Bill of Rights: Hearings Before the Subcomm., 91st Cong., 1st Sess. 10 (1972) (statement of Professor Arthur R. Miller).

See also Joyce, *The Privacy Act: A Sword And Shield But Sometimes Neither*, 99 MIL. L. REV. 113, (1983) Joyce states: "There is certainly a high societal interest in effective law enforcement and intelligence gathering activities. However, these activities are also potentially the most abusive to personal privacy." *Id.* at 132. Another commentator asserted that a strict construction of the Privacy Act seems appropriate even if not dictated by congressional history because the Act is meant to provide a means to effectuate *constitutional* rights and guarantees. Comment, *The Privacy Act of 1974: An Overview*, 1976 DUKE L.J. 301, 302 n.8. (emphasis in original) This commentator concluded, therefore, that privacy should weigh heavily against administrative convenience, and any construction of the Act in a "grey area" should be resolved in favor of granting rather than restricting rights. *Id.* (citing S. REP. No. 1183, 93d Cong., 2d Sess. 45, 47-48, 63 (1974)).

66. The first house version of § 552a(e)(7), which protected political and religious activities, would have protected the Communist Party and certain sects of the Black Muslim movement. These two groups were recognized as conspiratorial or clandestine, but known as political or religious. 120 CONG. REC. H10, 892 (Nov. 20, 1974).

67. Representative Ichord sponsored the law enforcement amendment. *Id.* The original amendment read: "Provided, however, that the provisions of this paragraph shall not be deemed to prohibit the maintenance of any record of activity which is pertinent to and within the scope of a duly authorized law enforcement activity." *Id.*

68. 120 CONG. REC. H10,952 (Nov. 21, 1974) ("It is really to make certain that political and religious activities are not used as a cover for illegal or subversive activities.") (statement of Rep. Ichord).

69. Speaking during senate debate, Senator Muskie discussed a Justice Department report concerning the F.B.I.'s "cointelpro" program where the F.B.I. conducted secret surveillance and sought to disrupt many organizations including the Urban League, the Southern Christian Leadership Conference, the Congress on Racial Equality, and other groups. 120 CONG. REC. S19,841 (Nov. 21, 1974). The F.B.I. had believed these groups to be a threat. *Id.*

Senator Nelson added his views on the revelations pertaining to the surveillance activities of the I.R.S. *Id.* The I.R.S. monitored the tax records and political activities of 3,000 groups and 8,000 individuals between 1969 and 1973. *Id.* Senator Nelson also mentioned that in 1970, President Nixon consented to the Huston Plan which involved domestic serveillance and called for wiretaps, electronic bugs, break-ins and other activities. *Id.* at S19,842. F.B.I. Director Hoover, however, objected to the

Furthermore, the congressional record clearly indicates that the drafters of the law enforcement exception did not intend to dilute the first amendment rights of law-abiding citizens.[70] The *MacPherson* opinion gave recognition to this part of the legislative history.[71] In arriving at its decision, however, the court did not attribute very much importance to it, but rather was guided by its own judgment favoring stronger law enforcement.

In determining its third policy consideration, the *MacPherson* court reasoned that the "observation and recording of the actions of innocent people" is inevitable in any investigation.[72] The court correctly concluded that *surveillance* of innocent people is inevitable, and is therefore necessary to achieve the exception's purpose.[73] The court, however, incorrectly concluded that the subsequent *collection* of information about innocent people is necessary.[74] The court justified its conclusion with the proposition that to impose upon agencies the burden of deleting information would be administratively cumbersome.[75]

This proposition is unjustified for two reasons. First, the Freedom of Information Act, which makes federal records available to the public upon request,[76] requires federal agencies to delete from their records those portions that are exempt from disclosure.[77] Because a prospective plaintiff may use either the FOIA or the Privacy Act to obtain access to agency records,[78] and because both acts regu-

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"Huston Plan". *Id.* As a result, the plan was buried. *Id.* Nixon's interest in the program, however, did not subside, and a White House unit called the "Plumbers" was created. *Id.* at S19,842. The "Plumbers" was the unit responsible for the break-in at Daniel Ellsberg's psychiatrist's office. *Id.* Finally, Senator Nelson discussed a 1973 Senate subcommittee report revealing that the U.S. Army used 1,500 agents to spy on over 100,000 civilians during the late 1960's. *Id.* at S19,842. Senator Nelson summed up these revelations when he stated: "[U]ncontrolled Government snooping is a dangerous assault on our constitutional liberties. Those liberties are the cornerstone of our democratic system and any assault on them cannot be treated lightly. A society cannot remain free and tolerate a Government which can invade an individual's privacy at will." *Id.* at S19,842.

70. After proposing his law enforcement amendment to the House version of § 552a(e)(7), Representative Ichord explained: "[S]o that there is no misunderstanding — these changes are designed to protect only legitimate national or internal security intelligence and investigations . . . . Let the legislative history be explicit. None of these changes are intended to abridge the exercise of first amendment rights." 120 CONG. REC. H10,892 (Nov. 20, 1974).

71. *MacPherson*, 803 F.2d at 483-84.

72. *Id.* at 484.

73. *Id.*

74. *Id.*

75. *Id.*

76. *See* Trubow, *Information Law Overview*, 18 J. MARSHALL L. REV. 815, 823-24 (1985).

77. Pursuant to subsection 552(b) of the FOIA: "Any reasonably segregable [sic] portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552 (1976).

78. The Privacy Act permits individuals to gain access to agency records per-

late the control of information,[79] it follows that what is not a burden on agencies under the FOIA cannot be a burden under the Privacy Act.

Second, the government argued that because there is nothing expressed in the Act that requires agencies to delete information identifying innocent people,[80] the IRS had no duty to delete from its records information identifying MacPherson.[81] Ironically, the government admitted that the IRS had already installed an administrative procedure for evaluating records.[82] Further, the Internal Revenue Manual Handbook dictates that review procedures should be used to identify and delete irrelevant or unnecessary information.[83] The court's assertion that it is administratively cumbersome to delete pieces of information from its records is unpersuasive in this context.

In determining its fourth policy consideration, the *MacPherson* court asserted that requiring agencies to delete portions of surveillance records would be damaging to the completeness and accuracy of such records.[84] The Office of Management and Budget, ("OMB")[85] however, urges agencies to avoid completeness in their

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taining to themselves and the FOIA permits individual access to any agency record. J. FRANKLIN, R. BOUCHARD, GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACT. §2.08[1] (2d ed. 1986). An individual's request must meet all the conditions of course, but it is clear that an individual may proceed under either act to request a record pertaining to himself. *Id.* In addition, the Privacy Act prohibits agencies from claiming an exemption under the FOIA when a record would be disclosed pursuant to the Privacy Act. 5 U.S.C. § 552a(q)(i) (Supp. II 1984). Conversly, the Privacy Act prohibits agencies from claiming an exemption under the Privacy Act when a record would be disclosed pursuant to the FOIA. *Id.* § 552a(q)(2).

79. Providing for a more open government, the FOIA gives the people a means of obtaining access to agency records except when certain information must remain off-limits pursuant to nine possible exemptions. J. FRANKLIN, R. BOUCHARD, *supra* note 78, § 1.02. The Privacy Act was a legislative response to concerns of government misuse of personal information and protects individual privacy through regulation of agency information-use. *Id.* § 2.02.

80. *See supra* note 4.

81. Brief for Appellees at 17-18, MacPherson v. IRS, 803 F.2d 479 (9th Cir. 1986).

82. *Id.* at 6-7. After information is collected, it is placed in the "Tax Protest Project File for immediate disposition and evaluation." *Id.* When the determination is made that the information is no longer needed, it is destroyed. *Id.*

83. The Internal Revenue Manual Handbook provides:

> (g) Existing supervisory or other review procedures should be utilized to identify instances of employees maintaining information that is not relevant or necessary. Reviewers should be authorized to delete such information from the record. . . advise employees of the irrelevant entry to assist them in clearly understanding the meaning and importance of relevance and necessity; and whenever trends are identified, make recommendations to the responsible official for further guidelines or other corrective actions.

HANDBOOK FOR INTERNAL REVENUE SERVICE § 17.35 (1987) (LEXIS, FedTax library, Manual File).

84. *MacPherson*, 803 F.2d at 484.

85. Under the Privacy Act, the Office of Management and Budget is required to

information gathering in order to prevent collection of irrelevant information.[86] OMB's criterion coincides with congressional intent to reduce the risk of inadvertant misuse of personal information.[87] The goal of completeness and accuracy in agency records, therefore, frustrates the Act's objectives.

The *MacPherson* court's interpretation of the law enforcement exception was overly broad. Consequently, the court's analysis of the facts was flawed. The court found it relevant that the records at issue were used, and were only intended to be used, to present a "complete picture" of the events.[88] Because Congress sought, however, to prevent negligent misuse of protected information,[89] good intentions and actual conduct are not sufficient to justify an agency's use of such information.[90] In this case, the IRS' attendance at the conventions coincided with MacPherson's speaking engagements. Surveillance, therefore, was indeed inevitable.[91] The purchase of the tapes of MacPherson's speeches and the note-taking, however, were not inevitable.[92] More importantly, because MacPherson did not use his right to free speech as a cover for subversive activities,[93] maintenance of the records concerning MacPherson was not justified. Consequently, the court should have held that the IRS violated the Act. Alternatively, even if congressional intent is unclear,[94] the law enforcement exception must meet the "strict scrutiny" standard under constitutional analysis because the exception permits federal agencies to infringe upon first amendment rights.[95]

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develope guidelines and regulations for implementing the Act and provide assistance and oversight in helping the agencies abide by the Act. Privacy Act, *supra* note 1.

86. 40 Fed. Reg. 28,965 (July 9, 1975) (Office of Management and Budget-Privacy Act Implementation Guidelines and Responsibilities).

87. The Office of Management and Budget's Guidelines and Responsibilities states: "A key objective of the Act is to reduce the amount of personal information collected by Federal agencies to reduce the risk of intentionally or *inadvertently* improper use of personal data. In simplest terms, information not collected about an individual cannot be misused." 40 Fed. Reg. 28,960 (July 9, 1975) (emphasis added).

88. *MacPherson*, 803 F.2d at 485.

89. *See supra* note 87.

90. In warning agencies against pursuing completeness in their records, the Office of Management and Budget's Guidelines further stipulates that agencies "must limit their records to those elements of information which clearly bear on the determination(s) for which the records are intended to be used. . . ." 40 Fed. Reg. 28,965 (July 9, 1975).

91. *MacPherson*, 803 F.2d at 480.

92. *Id. See supra* note 17.

93. *MacPherson*, 803 F.2d at 484.

94. One commentator asserted that because the Privacy Act's legislative process was hasty and haphazard, the Act is inconsistent and lacks a reliable indication of congressional intent. Comment, *The Privacy Act of 1974: An Overview and Critique*, 1976 WASH. U.L.Q. 667. The writer also stated that the original committee reports are of limited value, and the "skimpy" staff analysis of the compromise amendments is the only reliable legislative history. *Id.*

95. In United States v. Caroline Products Co., 304 U.S. 144 (1938), Justice Stone made a distinction between general regulatory legislation and governmental ac-

Consequently, the provision must employ absolutely necessary means to meet this standard.[96] In *New York Times Co. v. Sullivan*,[97] the United States Supreme Court articulated the concept that, when balancing the right to free speech against competing societal interests, the balance reached must be in accordance with first amendment standards.[98] Accordingly, the law enforcement exception must be balanced against first amendment rights, and that balance must be consistent with standards that satisfy the first amendment.

The *MacPherson* court implied that MacPherson's speeches deserved no protection because they were public and because tapes of the speeches were sold.[99] This analysis, however, contradicts public policy regarding free speech.[100] The government also claimed that any alteration of the MacPherson records would have limited the record's usefulness.[101] As the Internal Revenue Manual explains, however, the maintenance of the MacPherson records in this case was not necessary.[102]

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tion restricting fundamental rights in his now famous "footnote 4." Justice Stone wrote: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments. . . ." *Id.* at 152-53 n.4. The Court had abandoned its era of judicial activism in which the court struck down economic and social welfare legislation, but following *Caroline Products*, the court used strict scrutiny in examining legislation that affected civil rights or civil liberties. *See* J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW § 11.7 (3d. ed. 1986).

Today, the Supreme Court uses a strict scrutiny analysis under the due process clauses of the fifth and fourteenth amendments, and under the fourteenth amendment equal protection clause when legislation or governmental action restrict fundamental rights. *See* NOWAK, *supra* § 11.7. In Palko v. Connecticut, 302 U.S, 319, 325 (1937), fundamental rights were defined as being those rights "implicit in the concept of ordered liberty." They are rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.*

96. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964) (means must be "necessary, and not merely rationally related, to the accomplishment of a permissable state policy"); Bates v. Little Rock, 361 U.S. 516 (1960) ("where there is a significant encroachment upon personal liberty, the state may prevail only upon showing a subordinating interest which is compelling").

97. 376 U.S. 254 (1964).

98. *Id.* at 269. The Court reiterated this position in *Buckley v. Valeo*: "In view of the fundamental nature of the right to associate, governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.'" 424 U.S. 1 (1976) (per curiam).

99. *MacPherson*, 803 F.2d at 484.

100. "The First Amendment, said Judge Learned Hand, 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.'" New York Times v. Sullivan, 376 U.S. 254, 270 (1964) (quoting United States v. Associated Press, 52 F. Supp 362, 372 (S.D.N.Y. 1943)).

101. Brief for the Appellees at 18, *MacPherson v. IRS*, 803 F.2d 479 (9th Cir. 1986).

102. The Internal Revenue Manual explains:

> Surveillance activities at tax protest meetings will be limited to attendance at those meetings for purposes of identifying leading figures in the illegal tax pro-

The Court of Appeals for the Ninth Circuit is currently one of three circuits to have interpreted the law enforcement exception of the Privacy Act.[103] This court established a balancing test that returns to federal agencies the broad investigative powers that Congress intended to curtail.[104] The court achieved this effect by formulating a test which causes the exception to swallow the rule. Under the court's test, an individual's chance association with an organization subjects that individual to the informational needs of any agency investigating the organization.[105] The two other circuits[106] that have interpreted the law enforcement exception prescribe two different standards.[107] In view of the importance of this Act, conformity must be obtained. Accordingly, the Supreme Court should reverse *MacPherson* and set forth a standard which recognizes the history and value of the first amendment.

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tester movement and obtaining information concerning new techniques being advocated in these so-called tax protest movements. Special agents *may identify* those individuals who attend the meetings *who admit or indicate* that they: (a) have committed or intend to commit a tax violation, or other crimes. . .or (b) advocate that others commit violations of the tax law or other crimes. . . or advocate the use of threat and/or assault tactics in dealing with Service personnel. . . ."

MANUAL FOR INTERNAL REVENUE SERVICE § 9383.12 (1984) (emphasis added) (LEXIS, FedTax library, Manual File.

103. *MacPherson*, 803 F.2d 479.

104. *See supra* notes 47-50, 61-87 and accompanying text.

105. *See supra* notes 88-93 and accompanying text.

106. *See* Jabara v. Webster, 691 F.2d 272 (6th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983); Clarkson v. I.R.S. 678 F.2d 1368 (11th Cir. 1982).

107. *See supra* note 46.